Supreme Court, U.S.
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No. 01 235 AUG 7 - 2001

IN THE

Supreme Court of the United States

ALBERTO CONCEPCION,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether this Court should resolve a split in the circuits and hold that where the quantity of narcotics charged in an offense under 21 *U.S.C.* § 841 triggers the applicability of an enhanced penalty, the narcotics quantity sufficient to invoke the enhanced penalty is an element of the offense that must be proven to a jury beyond a reasonable doubt, overruling *United States v. Gibbs*, 813 F.2d 596 (3d Cir.) *cert. denied*, 484 U.S. 882 (1987).

(2) Whether the court below erred in finding that a plea to a narcotics conspiracy charge including a penalty enhanced on the basis of the quantity of the narcotics was knowing and voluntary where the district court failed to advise the defendant that the government would have to prove the element of a narcotics quantity sufficient to trigger the enhanced penalty to a jury beyond a reasonable doubt where that element is clearly a "material element" of the crime charged.

PARTIES BELOW

The parties to this case are those listed in the caption of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Alberto Concepcion, respectfully prays that a writ of certiorari issue to permit review of the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

On May 10, 2001, the United States Court of Appeals for the Third Circuit filed a judgment affirming the Final Judgment of Conviction of the United States District Court for the District of New Jersey entered July 7, 2000. (App. 1a). A Memorandum Opinion of the Court was filed by the United States Court of Appeals for the Third Circuit on May 10, 2001. (App. 3a).

JURISDICTION

The United States Court of Appeals for the Third Circuit rendered judgment on May 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution amend. VI.

United States Constitution amend. XIV.

21 *U.S.C.* § 841(a)(1).

STATEMENT OF THE CASE

On December 17, 2000, a federal Grand Jury sitting at Newark, New Jersey, returned a five count indictment against Concepcion and six other people, charging him with conspiracy to distribute 100 grams or more of heroin in violation of 21 *U.S.C.* §§ 841(a)(1), 846 (Count I), and with distribution and possession with the intent to distribute a quantity of heroin in violation of 21 *U.S.C.* § 841(a)(1) (Count IV).

Due to the charge of more than 100 grams of heroin, the statutory enhancement increased the penalty faced from 0-20 years (under 21 *U.S.C.* § 841(b)(1)(C) to 5-40 years (under 21 *U.S.C.* § 841(b)(1)(B)).

On or about March 15, 2000, Concepcion entered into a plea agreement with the government, pleading guilty to the first count of the indictment, conspiracy to distribute 100 grams or more of heroin in violation of 21 *U.S.C.* §§ 841(a)(1), 846.

Concepcion appeared before the Honorable Alfred J. Lechner, U.S.D.J., and entered a guilty plea to the first count of the indictment on or about March 16, 2000.

On or about May 31, 2000, Concepcion filed a motion to withdraw his plea, claiming innocence.

On or about July 7, 2000, the court, per Judge Lechner, denied Concepcion's motion to withdraw the plea-agreement and imposed sentence.

The court sentenced Concepcion to 325 months incarceration, far in excess of the 20 year (240 months) maximum that would have applied to the case had the district court not invoked the statutory enhancement in 21 *U.S.C.* § 841(a)(1)(B).

FACTS

On or about December 16, 1999, Concepcion was arrested. He was charged in two counts of a five count indictment alleging that: (1) he knowingly and intentionally conspired with Walter Roman, Julio Canales, Ana Negron, Jorge Retamar, and Wanda Santiago to possess and distribute 100 grams or more of heroin, in violation of 21 *U.S.C.* § 841(a)(1) (Count I); and (2) he knowingly and intentionally distributed and possessed with an intent to distribute a quantity of heroin, in violation of 21 *U.S.C.* § 841(a)(1) and 18 *U.S.C.* § 2 (Count IV). (App. at 5a).

On or about March 16, 2000, Concepcion entered a guilty plea to Count I of the indictment (conspiracy to distribute 100 grams or more of heroin) before the District Court, the Honorable Alfred J. Lechner, U.S.D.J., presiding. (Transcript of March 16, 2000 Proceedings, App. at 14a-15a).

The court advised Concepcion that the government would have to prove *two* elements to obtain a conviction, knowledge of the conspiracy and intent to join the conspiracy, but the court did *not* advise Concepcion that the government would have to prove that the conspiracy distributed at least 100 grams of heroin.

> Q. Those elements are set forth on page two—page three and they are two in number: First, that the conspiracy described in the indictment was voluntarily and intentionally formed and existing at or about the time charged; and second, that you knowingly and voluntarily joined that conspiracy.

(App. at 15a).

Concepcion then admitted that he conspired with the persons named in the indictment to sell heroin, which he acquired through various sources. The plea agreement included a stipulation that the quantity of narcotics at issue in the conspiracy was between 3 and 10 kilograms.

After entering the plea, Concepcion advised his attorney that he was innocent and never conspired to sell drugs with his alleged co-conspirators in the time period alleged in the indictment, May 1, 1998 through December 15, 1999.

Concepcion filed a motion to withdraw his plea, which was denied.

The District Court denied Concepcion's motion to withdraw his plea agreement.

The court then imposed sentence of 325 months. In so doing, the District Court imposed a penalty based on the enhancement provisions of 21 *U.S.C.* § 841(a)(1)(B) which includes a statutory minimum of 5 years and a maximum of 40 years, despite the fact that Concepcion

was not advised that the 100 gram quantity triggering the enhancement was an element of the offense, and that he had a right to put the government to its proofs on that element before a jury.

REASONS FOR GRANTING THE WRIT

I.

THERE IS CURRENTLY A SPLIT IN THE CIRCUITS ON THE QUESTION OF WHETHER THE NARCOTIC QUANTITY TRIGGERING AN ENHANCED PENALTY UNDER THE DISTRIBUTION AND CONSPIRACY TO DISTRIBUTE STATUTE IS A MATERIAL ELEMENT OF THE OFFENSE THAT NEEDS TO BE PLEADED AND PROVEN TO A JURY BEYOND A REASONABLE DOUBT.

Petitioner Concepcion was not advised by the District Court at the time that he pleaded guilty that in order for the enhanced penalties of 21 *U.S.C.* § 841(a)(1)(B) to apply to him should he go to trial the government would be required to prove that the conspiracy and/or distribution charge involved more than 100 grams of heroin. Concepcion concedes that the indictment in the case refers to the charge involving more than 100 grams, and he concedes that the plea agreement includes a stipulation to a quantity of between 3 and 10 kilograms[1]. Neither of those facts, however, controls. The fact that the charge itself referred to more than 100 grams did not

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[1] After the plea, Concepcion denied that he was guilty of any offense, and renounced the stipulation. His motion to withdraw his plea and to declare his innocence are not at issue in this petition.

inform Concepcion that he had a right to jury trial on that issue, and a right to put the government to its proofs on that issue. Similarly, any stipulation to a quantity greater than the 100 grams is likewise irrelevant to the case at hand. The question as to whether his plea was knowing and voluntary is not governed by any issues of actual innocence. Whether the conspiracy actually involved more than 100 grams of heroin is a different question than whether Concepcion made a fully informed decision in determining whether to plead guilty to the charge. A knowing, voluntary plea would have been one in which Concepcion could assess for himself whether the government could actually prove the existence of more than 100 grams in the conspiracy. Because Concepcion was not advised that the government would have to prove that more than 100 grams was involved in the conspiracy at the time that he went through the mental calculations to determine whether or not he should plead, he certainly did not have the ability to evaluate on an element by element basis whether the government could prove the case against him beyond a reasonable doubt. He was, in a word, misinformed by the District Court as to the elements of the charge against him.

The first step for the evaluation of whether Concepcion's plea was knowing and voluntary, then, is the determination of whether the drug quantity triggering the enhancement is in fact a material element of the crime charged. There is a split in the circuits on that topic, and for that reason petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

In *United States v. Gibbs*, 813 F.2d 596 (3d Cir. 1987), *cert. denied* 484 U.S. 882 (1987), the Third Circuit held that drug quantity triggering an enhancement was not an element of the offense. Five other circuits have held that it is an element of the offense. *U.S. v.*

Doggett, 230 F.3d 160 (2000), *cert. denied*, ___ S. Ct. ___, 2001 WL 38408 (2001); *United States v. Rebman*, 226 F.3d 521, 524 (6th Cir. 2000); *United States v. Aguayo-Delgado*, 220 F.3d 926, 931 (8th Cir.), *cert. denied*, 121 S.Ct. 600 (2000); *United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000); *United States v. Keeling*, 235 F.3d 533, 538 (10th Cir. 2000); *United States v. Rogers*, 228 F.3d 1318, 1356-27 (11th Cir. 2000).

The Sixth and Fourteenth Amendments to the Constitution entitle a criminal defendant to a jury determination that the defendant is guilty of each and every element of the crime charged, beyond a reasonable doubt. *Apprendi v. New Jersey*, ___ U.S. ___, 120 S.Ct. 2348, 2355 (2000). These rights are inviolable and have roots in our culture, history, and jurisprudence that predate our nation's founding. *Id.* at 2356.

In *Jones v. United States*, ___ U.S. ___ 119 S.Ct. 1215 (1999), this Court held that the Sixth and Fourteenth Amendments require that the Government allege and prove as elements of the charged offense provisions within a criminal statute that allow for enhanced penalties upon a specific showing, beyond a reasonable doubt. The statute at issue in *Jones* was a federal statute that provided a maximum 15-year term of imprisonment for an act of carjacking, but allowed for a maximum 25-year term if the carjacking resulted in serious bodily injury, or a term of imprisonment up to life if the carjacking resulted in death.[2] *Jones*, 119 S.Ct. at 1218.

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[2] The statute at issue in *Jones* provided, in pertinent part, that a person who "takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation . . . shall—(1) be imprisoned not more than 15 years . . . , if serious bodily injury . . . results, be . . . imprisoned not more than 25 years . . . , and if death results, be . . . imprisoned for any number of years up to life . . . ." 18 *U.S.C.* § 2119, *quoted in Jones*, 119 S.Ct. at 1216.

The government argued that the consideration of whether a carjacking resulted in serious bodily injury or death was a question to be determined at sentencing. In support of this argument, the government posited that the statute clearly separated the "elements" of the offense (violent, forceful, or intimidating conduct, taking a motor vehicle, connection with interstate commerce) from the "sentencing" provisions ("shall be . . . imprisoned not more than 15 years . . ."). *Id.* at 1218-19.

This Court rejected this argument. This Court noted that the language Congress employed in drafting the statute was not dispositive as to whether the conditions for exposing a defendant to higher penalties were "elements" or "sentencing factors." *Id.* at 1219. This Court, instead, examined the practical effect of the statutory provisions. This Court noted that the "penalty" section of the statute, in reality, allowed the imposition of "steeply higher penalties" that were absolutely conditioned upon a finding of further facts (bodily injury or death). *Ibid.* This Court also examined other federal statutes imposing greater penalties for causing bodily injury, and the history and purpose of the Sixth Amendment right to trial by jury. After this examination, this Court held that the statute should be construed as establishing three separate offenses by the specification of distinct elements, each to "be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for verdict." *Id.* at 1228. *See also Castillo v. United States*, ___ U.S. ___, 120 S.Ct. 2090 (1999) (holding clause in a statute that increased the maximum sentence of a person who uses a machinegun in relation to any crime of violence was subject to a mandatory 30-year prison term (as opposed to a 5-year term for a "firearm") set forth a separate element of the offense under the statute that must be charged, proven beyond a reasonable doubt, and submitted to a jury).

Concepcion argues *Jones* and *Castillo* would alone compel the result that drug quantity which triggers an enhanced penalty is an element of the offense. To the degree that this Court would have any doubt about the impact of *Jones* and *Castillo* on the issue at hand, however, this Court's decision in *Apprendi v. New Jersey*, 120 S. Ct. 2358 (2000), conclusively resolves those doubts.

Apprendi involved a defendant's appeal from a sentence enhancement imposed by a state court that resulted in a sentence in excess of the maximum penalty prescribed by statute. Apprendi was arrested after firing a handgun into the home of an African-American family; he later confessed to the police that his conduct was motivated by an animus against African-Americans. *Id.* at 2351-52. He ultimately pleaded guilty to possession of a firearm and an antipersonnel bomb for an unlawful purpose in the second degree, which carries a ten-year maximum sentence. *Id.* at 2352. At sentencing, the court imposed a twelve-year sentence after finding by a preponderance of the evidence that the victims' race motivated Apprendi's conduct. *Id.*

The Supreme Court reversed the decision of the New Jersey Supreme Court to affirm the sentence. In so doing, the Court held that "other than the fact of a prior conviction, *any fact* that increases the penalty beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[3] *Id.* at

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[3] The Court in *Apprendi* then incorporated into the holding Justice Stephens' concurring opinion in *Jones*, stating that " 'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.' " *Apprendi*, 120 S. Ct. at 2363 (quoting *Jones*, 119 S.Ct. 1215 (Stephens, J., concurring)).

2362-63 (emphasis added). The Court predicated its decision on traditional Anglo-American common law principles that permit a judge to exercise discretion *within* the range prescribed by the legislature for imposing punishment but not *beyond* that range, as well as the Court's decisions that clearly adhered to those principles. *Id.* at 2356-62.

One Circuit early on discussed the issue that the quantity of drugs to be proven to establish a conspiracy under the statute should be an element of the offense that must be charged, proven by the Government beyond a reasonable doubt, and submitted to the jury. *United States v. Rigsby*, 943 F.2d 631 (6th Cir. 1991). In *Rigsby*, the defendant was charged with conspiracy to distribute marijuana in violation of 21 *U.S.C.* § 841(a)(1). He was convicted. At sentencing, the judge imposed sentence under subsection 841(b), after finding by a preponderance of the evidence that he had more than 1000 marijuana plants in his possession. *Id.* at 639-640. The defendant appealed the conviction, arguing, *inter alia*, that the sentencing court was obligated to submit the question of quantity to the jury and that the jury had to find him guilty, beyond a reasonable doubt. *Id.* The court agreed with the defendant's argument, and, in so doing, foreshadowed the Supreme Court's discussion in *Jones*. The Sixth Circuit commented that quantity is a substantial factual issue because a finding as to quantity determined a defendant's maximum sentence, which could range between 10 years and life, depending upon the drug and the quantity possessed. *Id.* The court did not reverse the defendant's conviction, however, because previous panels of that court, as well as other circuits, had held that the quantity of drugs was a factor to be considered at sentencing, not an element of the crime. *Id.* at 642-43. *See United States v. Moore*, 540 F.2d 1088 (D.C. Cir. 1976) (holding that 21 *U.S.C.* § 845(a), because it provided

greater penalties for the distribution of drugs to a minor, required the government to prove to the jury, beyond a reasonable doubt, that the defendant sold drugs to a minor, and that whether drugs were sold to a minor is not merely a factor for the court to consider at sentencing).

The *Rigsby* court referred in its opinion to the dissent of Chief Judge Aldisert from the Third Circuit's decision in *Gibbs*, *supra*.[4] The Sixth Circuit commented that the dissent was persuasive in noting its disapproval of the previous holdings of its own panel, as well as other circuits, because Chief Judge Aldisert relied upon the importance drug quantity plays in determining a defendant's maximum statutory sentence. *Id.* at 641 n.5. Quoting from Chief Judge Aldisert's dissent, which now seems prescient in light of *Jones*, the Sixth Circuit stated "*Congress made the 1,000 pound marijuana quantity the fulcrum upon which turns the degree of opprobrium attached to the crime, and the concomitant degree of punishment available.* Given the importance of the quantity of marijuana involved, I would hold that it was intended to be an element of a greater inclusive offense under § 841(b)(6)." *Id.* (emphasis added).

Very recently, at least five circuits have held that the impact of the Court's broad language in *Apprendi* (*i.e.* "*any fact* that increases the penalty beyond the prescribed statutory maximum . . .") extends the holding in *Jones* to encompass § 841. In short, those circuits have held that *Apprendi* extends *Jones* to require the government to allege in an indictment and prove to a jury beyond a reasonable doubt the actual quantity of illegal drugs the defendant has manufactured or distributed,

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[4] In *Gibbs*, a panel of the Third Circuit held, in a 2-1 decision, that issue of the quantity of drugs in a conspiracy was an issue for the court to address at sentencing (upon proof by preponderance of the evidence), not an issue for the jury to decide (by proof beyond a reasonable doubt). *Gibbs*, 813 F.2d at 600.

thereby overruling the precedent in those circuits to the contrary. *See Doggett*, *Rebman*, *Aguayo-Delgado*, *Nordby*, *Keeling*, *Rogers*, *supra*.

For example, in *Doggett*, two defendants were indicted for conspiracy to manufacture an unspecified quantity of drugs in violation of 21 *U.S.C.* §§ 841(a), 846. *Doggett*, 230 F.3d at 162. A jury convicted the defendants. *Id.* At sentencing, the judge found by a preponderance of the evidence that the quantity of drugs was sufficient to incarcerate one defendant for 235 months and the other defendant for life. *Id.* The defendants objected to the imposition of enhanced penalties on grounds that *Jones* required the quantity of drugs to be proven to a jury beyond a reasonable doubt; this Court decided *Apprendi* during the pendency of the *Doggett* defendants' appeal. *Id.* at 162-63.

The Fifth Circuit acknowledged that although it could be argued that *Jones* did not clearly apply to require proving the quantity of illegal drugs as an element of the offense under § 841, *Apprendi* compelled this result. *Id.* at 163-64. The court noted that § 841(a) criminalized manufacturing or distributing illegal drugs and that § 841(b) defined specific penalties based on the type and quantity of drugs (among other factors). *Id.* at 164. The court then found that § 841(b) clearly predicates the severity of sentence upon proof concerning the quantity of drugs involved, from proof of no quantity ((b)(1)(C) (20 years)), to proof of 100 grams or more ((b)(1)(B) (40 years)) and to proof of 1 kilogram or more ((b)(1)(A) (life)). *Id.* The court commented that these increases were significant and held that "if the government seeks enhanced penalties based on the amount of drugs under 21 *U.S.C.* § 841(b)(1)(A) or (B), the quantity must be stated in the indictment and submitted to a jury for a finding of proof beyond a reasonable doubt." *Id.* at 164-

65. The Fifth Circuit then overruled its precedent decided prior to *Apprendi* that was inconsistent with the holding in *Doggett*. *Id.* at 165.

Applied here, *Apprendi* and the circuit court opinions it has engendered around the nation clearly compel the conclusion that the quantity of illegal drugs for which Concepcion agreed to plead guilty and on which his sentence was based constituted an element of the offense to be charged in his indictment and proven to a jury beyond a reasonable doubt. To the extent that *Gibbs* holds otherwise, this Court should overrule it and adopt the standard set forth in *Apprendi*.

Respectfully, petitioner urges that for the foregoing reasons, this Court should hold that the quantity of illegal substance is an element of the offense under 21 *U.S.C.* § 841 that must be charged in an indictment and proven to a jury beyond a reasonable doubt, overruling *United States v. Gibbs*.

II.

CONCEPCION'S GUILTY PLEA WAS NOT KNOWLEDGEABLE AND VOLUNTARY BECAUSE HE WAS NOT ADVISED THAT THE NARCOTICS QUANTITY TRIGGERING AN ENHANCEMENT WAS AN ELEMENT OF THE OFFENSE AGAINST HIM, DESPITE THE REFERENCE TO THE QUANTITY IN THE INDICTMENT AND/OR ANY STIPULATION TO THE QUANTITY IN THE PLEA AGREEMENT.

A district court must ensure a defendant's plea is knowing and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). This means advising the defendant

of the procedural constitutional rights being waived. *Id.* This also means engaging in colloquy with the defendant to ensure the defendant understands the nature of the "essential elements" of the charged offenses and the Government's obligation to prove them. *McCarthy v. United States*, 394 U.S. 459, 465-67 (1969); *F.R. Crim. P.* 11. *See United States v. Brown*, 117 F.3d 471, 476-77 (11th Cir. 1997). Although the court need not run through a ritualistic litany of the technical elements of the offense, the court is obliged to ensure that the defendant understands the nature of the "essential elements" of the offense under the totality of the circumstances. *See United States v. Cefaratti*, 221 F.3d 502, 508 (3d Cir. 2000).

For example, in *Brown*, the Eleventh Circuit vacated a guilty plea after the district court misinformed the defendant about the nature of the elements of the offense charged. The court accepting the defendant's guilty plea engaged in colloquy with the defendant advising him that his plea would waive his rights to remain silent, a jury trial, and cross examination. *Brown*, 117 F.3d at 473. The court then advised the defendant of the nature of the elements of the charge against him by actually reciting the elements. *Id.* After the defendant pleaded guilty and had been sentenced, the Supreme Court (in an unrelated case) held that the statute under which the defendant had pleaded guilty required that the Government prove an additional element, overruling previous Eleventh Circuit cases to the contrary. *Id.* The defendant filed a § 2255 petition on grounds that the plea and sentence should be vacated because he was not made aware of the element enunciated by the Supreme Court. *Id.* at 474. The Eleventh Circuit agreed, holding that the defendant's guilty plea could not have been knowing and voluntary because the elements the court discussed excluded an essential ele-

ment, thus misleading the defendant about the nature of the charges.[5] *Id.*

Brown is similar to the instant case and suggests that this Court should vacate Concepcion's plea and sentence. The District Court's explanation of the charges to Concepcion recited, incorrectly, that the elements of the government's case are "*two* in number": (1) knowledge of a conspiracy to distribute more than 100 grams of heroin; and (2) intent to participate in the conspiracy. (App. at 15a (emphasis added)). As in *Brown*, the District Court in its erroneous express recitation of the "elements" of the offense misled Concepcion, albeit unwittingly, given that *Apprendi* had not yet been decided. Because the District Court expressly referred to *two* elements and omitted proof of quantity as an element, and because *Apprendi* had not been decided, Concepcion and his attorney would have had no reason to know or understand that proof of quantity was a constitutionally required element of the Government's proofs on the charge to which he pleaded guilty. *See Nordby*, 225 F.3d 1059-60 (noting that it can be "no surprise" that defendant and counsel failed to object to *Apprendi* issue insofar as *Apprendi* and *Jones* had not been decided at the time of defendant's initial sentencing).

The government's argument that the sentencing court complied with Rule 11 by advising Concepcion of his right to remain silent, right to jury trial, and right to cross examine witnesses is unavailing. The inquiry here addresses whether Concepcion was aware of the nature of the "essential elements" of the offense to which he was pleading guilty, not the procedural safeguards his plea

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[5] The court also noted there was no retroactivity problem under *Teague v. Lane*, 489 U.S. 288 (1989), because the question involved interpreting a criminal statute, not the Constitution. *Brown*, 117 F.3d at 479.

would obviate. The two questions are different but are equally important in ascertaining whether a defendant's plea is knowing and voluntary. *Brown*, 117 F.3d at 476.

Second, the error was "plain," notwithstanding that *Apprendi* had not been decided at the time of Concepcion's plea hearing (March 2000). Where the settled law before the District Court is contrary to the law at the time of appeal, it is sufficient that the error be plain at the time of appeal. *See Johnson v. United States*, ___ U.S. ___, 117 S.Ct. 1544, 1547 (1997).

Third, Concepcion's substantial rights have been affected when viewed in light of the prejudice to him. Had Concepcion known that the Government would have been required to prove he was knowingly and intentionally involved in a conspiracy to distribute a certain quantity of heroin (100 grams or more), he could have chosen to put the government to its proofs on that topic. *See United States v. Knobloch*, 131 F.3d 366 (3d Cir. 1997).

To counter the argument that Concepcion's substantial rights have been affected, the government argued below that advice concerning the quantity of heroin being an element of the offense against him was rendered unnecessary because he stipulated to a quantity of drugs that placed him within the parameters set by § 841(b)(1)(B), in excess of 100 grams. In so doing, the government relied on cases such as *United States v. Poulack*, 236 F.3d 932 (8th Cir. 2001), *United States v. Champion*, 234 F.3d 106 (2nd Cir. 2000), and *United States v. Walker*, 228 F.3d 1276 (11th Cir. 2000).

The fact that Concepcion admitted to conspiring to distribute a given amount is not dispositive of the amount he believed the government could have proven beyond a reasonable doubt. Had the sentencing judge advised Concepcion that at trial the government would have to prove he conspired to distribute more than 100

grams of heroin, Concepcion could have refused to accept the plea on his belief that his attorney could have raised a reasonable doubt at trial concerning the extent of Concepcion's involvement (if any) in any alleged conspiracy involving that quantity of drugs. Concepcion could have impeached the drug quantity aspect of the case. *See Nordby*, 225 F.3d at 1060 (showing of ability to raise a reasonable doubt as to drug quantity distributed attributable to defendant's conduct, where the issue of quantity was not submitted to a jury, affects the defendant's substantial rights).

There can be little doubt, moreover, that Concepcion's substantial rights have been affected by the District Court's plain error, when viewed in light of the error's consequences. Concepcion was charged with having violated 21 *U.S.C.* §§ 841(a)(1), 846, and he pleaded guilty to that charge. He was sentenced under § 841(b)(1)(B), which imposes a sentence from 5 to a maximum of 40 years, which is a significant enhancement from the 20-year maximum allowed under § 841(b)(1)(C). The sentence actually imposed on Concepcion, more than 27 years, exceeds the maximum penalty allowed by § 841(b)(1)(C) by more than seven years. *See United States v. Anderson*, 201 F.3d 1145, 1152 (9th Cir. 2000) ("[A] longer sentence undoubtedly affects substantial rights.").

Finally, where a defendant pleads guilty and is sentenced beyond the maximum statutory range without being advised that the Government would have to prove beyond a reasonable doubt the very element of the offense that extended the sentence beyond the maximum, the fairness and integrity of the system sustain irreparable injury. *Nordby*, 225 F.3d at 1061 ("The rights to jury trial and a determination of guilt beyond a reasonable doubt are the bedrock of our constitutional system of

justice . . . [and] fairness is undermined when a court's error 'impose[s] a longer sentence than might have been imposed had the court not plainly erred.' ")

Accordingly, for all the foregoing reasons, this Court should vacate Concepcion's plea of guilty.

CONCLUSION

Therefore, for all the foregoing reasons this Court should hold that: (1) the quantity of drugs manufactured or distributed is an element of the offense under 21 *U.S.C.* § 841 that must be charged in the indictment and proven to a jury beyond a reasonable doubt, overruling *United States v. Gibbs*; and (2) the District Court committed plain error in failing to advise Concepcion at his plea hearing that the Government would have to prove to a jury beyond a reasonable doubt that he conspired to distribute 100 grams or more of heroin as an element of the offense charged against him.

Respectfully submitted,

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August 6, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2132

UNITED STATES OF AMERICA

v.

ALBERTO CONCEPCION aka
BERT
Alberto Concepcion

Appellant

On Appeal from the United States District Court
for the District of New Jersey

District Judge Alfred J. Lechner, Jr.
(D.C. Crim. No: 99-cr-00753-1)

Argued April 19, 2001

Before: SLOVITER, RENDELL,
and FUENTES, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued on April 19, 2001.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the said District Court entered July 7, 2000, be, and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

Attest:

/s/ ILLEGIBLE
Clerk

Dated: May 10, 2001

UNITED STATES COURT OF APPEALS
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Before: SLOVITER, RENDELL,
and FUENTES, *Circuit Judges*

(Opinion Filed: May 10, 2001)

MEMORANDUM OPINION OF THE COURT

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FUENTES, *Circuit Judge*.

Pursuant to a negotiated plea agreement, Alberto Concepcion pleaded guilty to conspiracy to distribute 100 grams or more of heroin in violation of 21 U.S.C. §§ 841(a)(1), 846. Thereafter, he was sentenced to a 325 month term of imprisonment. In this appeal, Concepcion contends that the District Court failed to properly advise him of the nature of the offense against him and that it abused its discretion in denying his motion to withdraw his guilty plea. Concepcion additionally argues that the District Court committed clear error by (1) imposing a two level sentence enhancement for obstruction of justice and by (2) assigning Concepcion to criminal history category II. Discerning no error in any of the District Court's rulings, we will affirm.

I

Because we write solely for the parties and not for publication, we need not set forth a detailed recitation of the background for this appeal and will limit our discussion to the resolution of the issues presented. On December 9, 1999, following an 18 month investigation into the distribution of drugs and firearms in the Broadway Townhouses, a federally-funded housing complex in Newark, federal investigators obtained a warrant for the arrest of Alberto Concepcion. On December 17, 1999, a federal grand jury returned an indictment charging Concepcion in Count One with knowingly and intentionally conspiring to distribute and possess with intent to distribute more than 100 grams of heroin in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. Count Four of the indictment charged Concepcion with knowingly and intentionally distributing and possessing with intent to distribute a quantity of heroin, a schedule I controlled substance, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The other counts of the indictment charged his associates with related crimes.

In March 2000, Concepcion commenced discussions with the U.S. Attorney's office in Newark regarding a plea agreement. Soon thereafter, Concepcion accepted an agreement wherein he would plead guilty to Count I of the indictment and consent to the forfeiture of two automobiles. The government agreed in exchange to dismiss Count IV. In conjunction with the plea agreement, Concepcion agreed to stipulate at sentencing that, in regard to the conspiracy, "the amount of heroin reasonably foreseeable, and thus attributable, to him is at least 3 kilograms but less than 10 kilograms. *See* U.S.S.G. § 3B1.1(b). Accordingly, the applicable base offense level for this case is 34." On March 16, 2000, Concepcion pleaded guilty to Count One of the indictment. Dur-

ing the plea hearing, the District Court reviewed with the defendant the nature and consequences of the plea.

Subsequently, by letter dated May 26, 2000, Concepcion filed objections to the PSR in which he asserted his innocence in regard to the drug conspiracy. On June 29, 2000, one day before his sentence and more than three months after his guilty plea, Concepcion filed a motion withdraw his guilty plea. On June 30, 2000, the District Court granted Concepcion a hearing on his motion to withdraw the plea. Concepcion contended that he could offer "fair and just" reasons entitling him to withdraw his plea. The District Court allowed Concepcion to testify, during which testimony he stated he knew that making statements contrary to his plea agreement, if later viewed untruthful by the court, could result in an upward adjustment in his sentence on grounds of obstruction of justice. Concepcion nevertheless testified that his plea of guilty was entered with the hope of causing the ongoing insurance fraud investigation against his brother and sister to terminate. Concepcion asserted that he was in fact innocent of conspiracy with the named associates, although he admitted selling drugs to a confidential informant. The District Court permitted no other witnesses. Concepcion offered three exhibits in support of his motion, all accepted by the court: (1) a polygraph examination record; (2) a taped telephone conversation between Kaiser Carter, an ex-girlfriend of Concepcion. and Jorge Retamar, an associate of Concepcion, in which Retamar denied that Concepcion sold him drugs during the period specified in the indictment; and (3) Concepcion's objection to the PSR.

On July 7, 2000, the District Court denied Concepcion's motion to withdraw his plea agreement. The court found that Concepcion's testimony regarding his state of duress in entering the plea agreement was not credible. Finding that Concepcion testified untruthfully in his attempt to

withdraw his plea, the District Court determined that Concepcion's attempt constituted obstruction of justice meriting a two level enhancement of his sentence. The District Court explained that Concepcion was not credible in part because he failed to identify any specific information about the feared investigation of his siblings, and because he could not even identify with certainty the police agencies involved in the investigation. In sentencing Concepcion, the District Court assigned him to Criminal History Category II based on a prior state court conviction for death by auto in the third degree.

The District Court had jurisdiction of this matter pursuant to 18 U.S.C. § 3231. This court holds jurisdiction over the challenges to the conviction pursuant to 28 U.S.C. § 1291 and over the challenges to the sentence pursuant to 18 U.S.C. § 3742(a). Because Concepcion did not raise the argument at the trial level that his guilty plea was not valid, we review for plain error. *United States v. Knobloch*, 131 F.3d 366, 367 (3rd Cir. 1997). We review the District Court's denial of Concepcion's motion to withdraw his guilty plea for abuse of discretion. *United States v. Trott*, 779 F.2d 912, 915 (3rd Cir. 1985). We review the District Court's determination of whether Concepcion merited a two-level enhancement for obstruction of justice for clear error. *United States v. Powell*, 113 F.3d 464, 467 (3rd Cir. 1997). We review the District Court's decision to assign Concepcion to Criminal History Category II for plain error, *See* Fed. R. Crim. P. 52(b); *see also Johnson v. United States*, 520 U.S. 461, 466-67 (1997).

II

A. The Guilty Plea

Concepcion's initial contention is that the District Court did not apprise him of the nature of his offense and that this court must therefore vacate his guilty plea. He maintains that the plea colloquy was faulty because the District Court did not advise him of the nature of his charged offense of conspiracy to violate 21 U.S.C. § 841(a)(1), as articulated in § 846. We find, however, the District Court engaged in a careful and thorough plea colloquy with the defendant in which the defendant showed a clear understanding of the charge against him, including the fact that he was accused of dealing in more than 100 grams of heroin. Specifically, the District Court reviewed with Concepcion the charge in the indictment, stating the amount and types of drugs involved in the conspiracy and Concepcion's knowing and voluntary participation in the drug enterprise:

THE COURT: Let me just review it with you. . . . It indicates in the first paragraph you're pleading guilty to count one of the indictment which charges you with conspiracy to distribute more than 100 grams of heroin. Is that correct?

CONCEPCION: Yes, sir.

THE COURT: In the second page, it sets forth the penalties that you could suffer as a result of your plea. Did you talk with your attorney about these penalties?

CONCEPCION: Yes, sir.

THE COURT: Do you understand that this violation has a statutory minimum penalty of five years imprisonment and a maximum penalty of 40 years imprisonment. . . ?

CONCEPCION: Yes, sir. . . .

THE COURT: Now, have you and your attorney talked about the elements of the offense that the Government must prove beyond a reasonable doubt in order to obtain a conviction in this case?

CONCEPCION: Yes, sir.

THE COURT: Those elements are set forth on . . . page three [of the U.S. Attorney's letter to the Court] and they are two in number: First, that the conspiracy described in the indictment was voluntarily and intentionally formed and existing at or about the time charged; and second, that you knowingly and voluntarily joined that conspiracy. Do you understand those elements?

CONCEPCION: Yes, sir. . . .

THE COURT: Now, do you understand that at a trial, as I mentioned a few moments ago, the Government is required to prove each element of the offense charged and do so beyond a reasonable doubt and by entering this plea, you're giving up that right?

App. 48-51, 54. The District Court not only read the indictment to Concepcion, but confirmed that Concepcion had read the indictment, consulted with his attorney and understood the government's obligation to prove all the elements of the offense beyond a reasonable doubt. Even if the District Court had erred, there was no plain error because, in the plea agreement, Concepcion admitted that he had dealt with 3 to 10 kilograms of heroin in the course of the conspiracy charged in the indictment. Additionally, the District Court advised Concepcion of the maximum and minimum sentences applicable to his offense. The court told Concepcion that a conviction for his offense carried a "statutory minimum penalty of five years imprisonment and a maximum penalty of 40 years imprisonment." We conclude that the District Court clearly and unambiguously informed Concepcion of the nature of the offense and the consequences of the plea.

B. Obstruction of Justice

We turn next to Concepcion's contention that the court erred when it imposed a two level enhancement for obstruction of justice. During the plea withdrawal hearing, Concepcion testified that he was in fact innocent and had only entered his guilty plea under duress. He claimed that he pleaded guilty only to protect his siblings from a continuing investigation. United States Sentencing Guidelines Section 3C1.1 provides:

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1. During the June 30, 2000, hearing, the District Court had an opportunity to observe Concepcion's demeanor and appearance and to evaluate his credibility and sincerity as he testified. Based on its observations and its overall assessment of the evidence, the court could certainly conclude that Concepcion was not truthful. *See United States v. Kim*, 27 F.3d 947, 961 (3d Cir. 1994). Before imposing the enhancement, the court noted that the statements of Concepcion's co-defendants all supported his initial plea of guilty and that Concepcion could not substantiate the nature or existence of the alleged investigation that created the alleged duress. In these circumstances, we find that the District Court did not err when it concluded, by a preponderance of the evidence, that Concepcion perjured himself and engaged in obstructive conduct as contemplated under § 3C1.1. *Id.* Further, we find no merit to Concepcion's arguments that the District Court failed to give sufficient weight to the submitted tape of the Retamar conversation, to the polygraph exam, or to Concepcion's offer to present witnesses in support of his contention of duress. We will therefore affirm the District Court's finding that Concepcion engaged in obstruction of justice meriting a two level increase under U.S.S.G. § 3C1.1 and its decision to deny the motion to withdraw the guilty plea.

C. Criminal History Category

Finally, Concepcion maintains that the District Court erred in assigning him a Criminal History of Category II rather than I. The court arrived at this decision over the objection of defense counsel, who argued that Concepcion served but 15 days in jail and six months of house arrest on his prior sentence of imprisonment. The District Court subsequently sentenced Concepcion to a cus-

todial term of 325 months, a sentence in the middle of the guideline range for an offense level of 39 and a Criminal History Category of II. Concepcion asserts that his prior state conviction did not constitute a prior sentence of imprisonment. He acknowledges that his prior judgment of conviction sentenced him to 364 days incarceration. He claims, however, that the sentence provided that he could apply for admission to Essex County's "Eclipse Program," and that participation in that program would suffice as a substitute for incarceration.

The Eclipse Program, for which state inmates apply following conviction, utilized a house arrest format, implementing electronic bracelets to monitor non-violent offenders. Application Note 4 to U.S.S.G. § 4A1.2 states, "A sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment (e.g., $1,000 fine or ninety days' imprisonment) is treated as a non-imprisonment sentence." Although the state trial court judge remarked that Concepcion could apply for admission to the Eclipse Program, he did not sentence Concepcion directly to the program. Rather, the trial court imposed a specific term and peripherally indicated that Concepcion could seek admission to the program as a means of altering the condition of his sentence. Because a reference by the trial judge to the Eclipse Program does not render a sentence non-incarcerative, the probation officer drafting the presentence report determined that Concepcion had accrued two criminal history points pursuant to U.S.S.G. § 4A1.1(b) for his prior sentence of at least sixty days. We agree in this assessment.

Moreover, because Concepcion raises this issue for the first time on appeal, we review the District Court's determination only for plain error. *See* Fed. R. Crim. P. 52(b); *see also Johnson v. United States*, 520 U.S. 461, 466-67 (1997). Even if the District Court erred in assign-

ing Concepcion to Criminal History Category II, this error did not affect his substantial rights. Given his offense level of 39, Concepcion's guideline range within Category I would be 262 to 327 months. The District Court, accordingly, could have imposed the same 325 month sentence without assigning Concepcion to Criminal History Category II.

III

For the reasons stated above, we will affirm the judgment of the District Court.

TO THE CLERK:

Please file the foregoing opinion

/s/ Julio M. Fuentes
Circuit Judge

[10] to prison for an additional period of up to three years?

A Yes, sir.

Q Now, as I understand it, you have agreed that as a result of this violation, you're going to consent and not contest the forfeiture of personal property, specifically a white 1998 Lexus LS400 and a white 1997 International flatbed tow truck. Is that correct?

A Yes, sir.

Q And also I understand that you have agreed that the forfeiture of these items is not excessive under the Eighth Amendment to the Constitution of the United States.

Is that what you agreed?

A Yes, sir.

Q You talked about that with your attorney?

A Yes, sir.

Q He's explained all that to you?

A Yes, sir.

Q And you also understand that that forfeiture will in no way prevent me or any other sentencing judge from ordering restitution and/or imposing a fine?

A Yes, sir.

Q Now, have you and your attorney talked about the elements of the offense that the Government must prove beyond a reasonable doubt in order to obtain a conviction in this case?

A Yes, sir.

[11] Q Those elements are set forth on page two—page three and they are two in number: First, that the conspiracy described in the indictment was voluntarily and intentionally formed and existing at or about the time charged; and second, that you knowingly and voluntarily joined that conspiracy.

Do you understand those elements?

A Yes, sir.

Q Now, have you or has anybody on your behalf made arrangements with any judge concerning sentencing in this case?

A No, sir.

Q Has anybody told you or promised you that if you pled guilty you would receive a light sentence or, indeed, any particular sentence?

A No, sir.

Q As you stand here now, are you satisfied with the services of your attorney?

A Yes, sir.

Q Do you have any questions or concerns which you feel he has not adequately answered?

A No, sir.

Q Whose decision is it to enter this plea, yours or your attorney's?

A Mine.

Q Now, has your attorney explained to you that this is a felony offense?